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Date of Decision: 19th January 1996

CRIMINAL APPEAL NO. 409 OF 1989

with

CRIMINAL APPEAL NO. 410 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

and

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may
be allowed to see the judgment? Yes

2. To be referred to the Reporter or not?
No

3. Whether their Lordships wish to see
the fair copy of judgment? No

4. Whether this case involves a
substantial question of law as to the
interpretation of the Constitution of
India, 1950 or any order made
thereunder? No

5. Whether it is to be circulated to the
Civil Judge? No

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Shri H.M. Chinoy, Advocate, for the Appellant in both appeals

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent
in both appeals

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 19th January 1996)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed
by the learned Additional Sessions Judge of Surat on 17th June

1989 in Sessions Case No. 140 of 1988 convicting the appellant of each appeal of the offence punishable under sec. 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) and under sec. 66(1)(b) of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief) and sentencing each of them to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years more for the offence punishable under the NDPS Act without imposing any separate sentence for the offence punishable under the Prohibition Act is challenged in both these appeals at the instance of both the convicted-accused. Since both these appeals are directed against the same judgment and order of conviction and sentence passed by the learned trial Judge and since common questions of law and fact are found arising in both these appeals, we have thought it fit to dispose of both these appeals by this common judgment of ours.

2. It is not necessary to set out in detail the facts giving rise to both these appeals. It may be sufficient to note that in all three persons (including the appellants in both these appeals) were found by the police in suspicious circumstances on 12th November 1987 at about 8.30 p.m. in the slum areas situated in Limbayat Mitikhadi Azad Chowk at Udhna. Their persons were thereupon searched. What was found therefrom was about 8 grams and 100 mg. of brown sugar from the appellant of Criminal Appeal No. 409 of 1989 (original accused No. 1) and about 17 grams and 550 mg. of brown sugar from the appellant of criminal Appeal No. 410 of 1989 (original accused No. 3). The third person also had brown sugar to the tune of 5 grams and 4 mgs. The contraband articles were thereupon seized in presence of two panchas. Thereafter the Police Sub-Inspector, named, Shri R.B. Patel, attached to the Police Station at Udhna conducting the search of the said three persons lodged his complaint of the incident. The proceeding arising therefrom ultimately came to be registered as Sessions Case No. 140 of 1988 in the Sessions Court of Surat. The case appears to have been assigned to the learned Additional Sessions Judge for trial and disposal. In the course of trial one person, named, Motiram (accused No. 2) absconded from jail. His case was thereupon separated from the remaining two accused. The trial resulted in conviction of the appellant in each case of the offences punishable under sec. 20(b)(i) of the NDPS Act and under sec. 66(1)(b) of the Prohibition Act and sentencing of each appellant to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years for the offence punishable under the NDPS Act without imposing any separate sentence for the offence punishable under the Prohibition Act. That aggrieved each appellant. Both of them have therefore filed their respective appeals questioning the correctness of their conviction and sentence.

3. As transpiring from the evidence on record, no option was given to either appellant whether or not he would like to be searched in presence of a gazetted officer or a magistrate as required by sec. 50 of the NDPS Act before effecting the search of their person. The aforesaid statutory provision is held to be mandatory by the binding rulings of the Supreme Court in the case of Ali Mustaffa Abdul Rehman Moosa v. State of Kerala reported in 1995 Supreme Court Cases (Cri) 32 and in the case of Saiyad Mohd. Saiyad Umar Saiyad and Others v. State of Gujarat reported in 1995 Supreme Court Cases (Cri) 564. It has further been held therein that non-compliance with the aforesaid mandatory provision would be fatal to the prosecution case.

4. The aforesaid binding rulings of the Supreme Court are on all fours applicable in the present case. As pointed out hereinabove, the evidence on record does not show that any option was given to either appellant whether or not he would like to be searched in presence of a gazetted officer or a magistrate as required by sec. 50 of the NDPS Act before effecting search of their respective persons. In that view of the matter, conviction of each appellant deserves to be quashed on this ground alone.

5. The similar result would ensue on examination of the case from a different angle. It clearly transpires from the evidence of the complainant, named, R.B. Patel (Prosecution Witness No. 2 at Ex. 15), that the seized contraband articles were sent to the forensic science laboratory for examination and report on the very next day of the incident. It may be mentioned that he was the Police Sub-inspector attached to the police station at Udhna. In para 14 of his cross-examination he has admitted that the articles sent to the forensic science laboratory for examination and report were returned on the ground that the seals affixed thereon were in broken condition and the proforma was not in the prescribed form. It has further been stated by the witness in his cross-examination in para 14 of his cross-examination at Ex. 15 that the packet in question received back from the forensic science laboratory was sent back to it after rectifying the defects found. It thus becomes clear from his evidence that, when the sealed packet reached the forensic science laboratory for examination and report, the seals affixed thereon were in broken conditions. The prosecution has not chosen to explain how the seals affixed on the sealed packet came to be broken. It has also not chosen to explain exactly at what place and at whose hands the seals affixed on the packet came to be broken. In absence of any cogent and convincing explanation in that regard, we are of the opinion that it becomes doubtful whether or not what was sent to the forensic science laboratory for examination and report was the very same articles seized from the appellant in each case at the relevant time. We have therefore come to the conclusion

that the prosecution has not been able to bring the guilt home to any of the accused beyond any reasonable doubt. The judgment and order of conviction and sentence qua each appellant deserves to be quashed and set aside also on this ground alone.

6. In the result, both these appeals are accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Surat on 17th June 1989 in Sessions Case No. 140 of 1988 convicting each appellant of the offence punishable under sec. 20(b)(i) of the NDPS Act and under sec. 66(1)(b) of the Prohibition Act and sentencing each of them to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years for the offence punishable under the NDPS Act without imposing any separate sentence for the offence punishable under the Prohibition Act is quashed and set aside. We are told that the appellant in each case is in jail serving the term of their sentence as imposed by the learned trial Judge. Both the appellants (Sukhlal Kishan Mangarudi and Sikandarkhan Gulabkhan Pathan) are ordered to be set at liberty if no longer required in any other case. The muddamal articles may be disposed of as directed by the learned trial Judge in his impugned judgment and order.
